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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL O.,

Defendant and Appellant.

D052261

(Super. Ct. No. MH101930)

APPEAL from an order of the Superior Court of San Diego County, Theodore M. Weathers, Judge. Affirmed.

Joel O. appeals from an order precluding him from possessing firearms based on a finding that he would not be likely to use them in a safe and lawful manner. (Welf. & Inst. Code,¹ § 8103, subd. (f).) He contends the preponderance of the evidence standard used in section 8103, subdivision (f) to permit deprivation of the right to possess firearms

¹ Subsequent statutory references are to the Welfare and Institutions Code.

is unconstitutional, and that the clear and convincing evidence standard should apply.

We reject his argument and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 8, 2007, Joel's family arranged an intervention with Joel in the presence of several people, including his mother, father, and an addiction intervention worker. During the intervention, Joel (age 31) stated that he felt like raping and killing women who reject him and that he often thinks about killing himself or others. Joel owned several weapons. During the intervention, the police were summoned. The police took Joel into custody and confiscated his weapons, including several firearms.

Joel was transported to a mental hospital and admitted for evaluation and treatment. Staff psychiatrists reported that he had "intermittent suicidal ideation." About five years before, he had engaged in a near suicide attempt with a gun until his friends called for help. Although he had not voiced any "current homicidal ideation," there was concern about his statements about "wanting to kill and rape women who reject him" and his lack of "qualms about hurting other people." He had a chronic history of alcohol and marijuana use. He was assessed as having a moderate potential for harm given his "lack of insight, various stressors, and the comorbidity of substances in the picture." He was given medication and monitored.

On November 9, 2007, Joel told a hospital social worker that he was angry at his family for the intervention and angry that his guns had been confiscated. He stated that if he ever saw the counselor who participated in the intervention he would "knock her down

and beat the shit out of that bitch . . . [and] she better have a hand full of money to pay [him] back or spread her legs for [him] so [he] could get what [he] want[ed]."

On November 10, 2007, a staff psychiatrist reported that Joel had "[n]o suicidal or homicidal ideation." However, he was "still voicing adamant anger towards the intervention participants and the loss of his firearms . . ." and his "[i]nsight and judgment were poor in that he felt as though his rights are being violated and his entitlement towards his prior way of living and collection of weapons were not to be disrupted based on his statements of wanting to shoot people and to shoot himself." He was not interested in participating in a sobriety program and believed he could stop using drugs and alcohol whenever he wanted.

Joel was discharged from the hospital on November 14, 2007. The discharging psychiatrist diagnosed him with "Adjustment Disorder with a Mixed Disturbance of Emotion and Conduct" and "Polysubstance Dependence." The psychiatrist reported that Joel denied current suicidal or homicidal ideation or intent and that he had not displayed self-injurious or assaultive behaviors during his hospitalization. The psychiatrist concluded that his mental state had improved and he had "no current potential for harm to self or others."

At the time of his discharge, Joel was advised of the law prohibiting him from possessing firearms for five years and his right to request a hearing to obtain relief from this prohibition. He requested a hearing, and a hearing was held on December 20, 2007. The People submitted his medical records into evidence, and Joel testified on his own behalf.

Joel testified that he had never violated any firearms laws; he had always been safe and responsible with his guns; and he had stopped drinking and smoking. He stated he wanted to possess firearms for hunting, collectability, and defensive purposes. In his view, the police could not protect him, and he was responsible for protecting himself and people around him who could not protect themselves. He acknowledged that his father currently had a restraining order against him, and opined that his father had obtained it "just to make [his] life hell." He believed the judge imposed the restraining order because people think he has problems or because he disrespected her (the female judge). He testified he had "a hard time respecting some people"; he did not think the founding fathers thought women should be judges; the country was "going down the tubes" and it was his duty to make it better; and he did not have much respect for police officers. When asked if he did not like women, Mexicans, or blacks in positions of authority, Joel replied: "No, I believe in an old school belief system and the Constitution that our forefathers of this country believe in." When asked if he was frustrated that women, Mexicans, and blacks are in positions of authority, he replied: "Sometimes. But my problems [are] with people that get in my way and cause me problems."

Joel denied making statements during the intervention that he wanted to kill and rape women who rejected him, and testified that he had instead stated that "sometimes it feels like [he] might have to just to get laid." He denied stating that he wanted to rape the intervention counselor, and testified that he had instead stated that because she had "a hand in ruining [his] life," he expected "some money, compensation or sexual favors voluntarily." He claimed he would never force himself on a woman because he did not

want to go to prison. He testified that "a few people owe [him] things for ruining [his] life this year," in particular his father, who had offered to pay for a treatment program which he viewed as a "rip-off" and a "bunch of scam artists." He testified he wanted "some cash so [he could] maybe go to Europe for a few months, maybe get over it."

The trial court found that the preponderance of the evidence showed that Joel would not likely use a firearm in a safe and lawful manner, and accordingly denied Joel's petition to be released from the five-year prohibition on firearms possession.²

DISCUSSION

Sections 5150 and 5151 permit a person to be taken into custody and detained when there is probable cause that he or she is a danger to him- or herself or others as a result of a mental disorder. Section 8103, subdivision (f) provides that when a person is admitted into a mental health facility under these sections, he or she may not possess firearms for five years after release from the facility. (§ 8103, subd. (f)(1).) The person may request a hearing to lift this prohibition. (§ 8103, subd. (f)(5); *People v. Keil* (2008) 161 Cal.App.4th 34, 38.) Section 8103, subdivision (f)(6) provides that at the hearing, "[t]he people shall bear the burden of showing by a preponderance of the evidence that the person would not be likely to use the firearms in a safe and lawful manner."

² The trial court did not rule on the disposition of Joel's weapons that were confiscated by the police, stating that this issue was not before it. On appeal, Joel's counsel argues that the clear and convincing evidence standard should apply to the issue of the five-year prohibition on possession of firearms (§ 8103) and the issue of the return of confiscated firearms (§ 8102). However, he does not dispute the propriety of the trial court's ruling that the issue of the disposition of the weapons was not before it, nor does the record on appeal include any ruling on the disposition of the weapons. Accordingly, this appeal does not concern the disposition issue.

To support his argument that the preponderance of the evidence standard set forth in section 8103 is constitutionally infirm, Joel relies on the United States Supreme Court's recent holding that an individual has a constitutional right to possess firearms. (*District of Columbia v. Heller* (2008) ___ U.S. ___ [128 S.Ct. 2783] (*Heller*).) In *Heller*, the high court evaluated the meaning of the Second Amendment to the federal Constitution, and concluded that the constitutional right to possess firearms was not limited to possession for military use, but included an individual's right to possess certain firearms in the home for self-defense. (*Id.* at pp. 2787-2788, 2797, 2821-2822.)³ The court noted, however, that this right was subject to restrictions by the government, and that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill" (*Id.* at pp. 2816-2817.)

The Attorney General asserts that the constitutional right to possess firearms does not apply to the mentally ill, and accordingly Joel's constitutional challenge to the use of the preponderance of the evidence standard is necessarily unavailing. The Attorney General's argument in this regard fails to consider the question of *what procedures must be followed* to determine whether a person who has been detained for a mental disorder can be deprived of the right to possess firearms. This is the question before us.

³ *Heller*, which evaluated a statute prohibiting handgun possession in the home in the federally-governed District of Columbia, left open the question of whether the Second Amendment applies to the states. (*Heller, supra*, 128 S.Ct. at pp. 2813, fn. 23, 2821-2822; see *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 312, fn. 3, 313; *People v. Flores* (2008) 169 Cal.App.4th 568, 573, fn. 4.) We will assume for purposes of our analysis that the Second Amendment does apply to the states.

When the government deprives an individual of a liberty or property interest, the individual has a constitutional right to procedural due process. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332.) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (*Id.* at p. 334.) One component of procedural due process is the standard of proof used to support the deprivation. The standard of proof must satisfy "the constitutional minimum of 'fundamental fairness.'" (*Santosky v. Kramer* (1982) 455 U.S. 745, 756, fn. 8.)

To determine whether a procedure satisfies due process, the courts balance three factors: (1) the private interest affected by the proceeding; (2) the risk of an erroneous deprivation of the interest created by the state's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. (*Santosky v. Kramer, supra*, 455 U.S. at p. 754; *Mathews v. Eldridge, supra*, 424 U.S. at p. 335.) Regarding the procedural role of the standard of proof, *Santosky* explains: "[T]he minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." (*Santosky, supra*, 455 U.S. at p. 755.) When the preponderance of the evidence standard of proof is used, the risk of an erroneous deprivation of the interest is shared "in roughly equal fashion" between the parties. (*Addington v. Texas* (1979) 441 U.S. 418, 423.) The beyond a reasonable doubt standard is "designed to exclude as nearly as possible the likelihood of an erroneous judgment" and "imposes almost the entire risk of error upon [the government]." (*Id.* at pp. 423-424.) The clear and convincing evidence standard

represents an intermediate standard that "reduce[s] the risk to the [individual] . . . by increasing the [government's] burden of proof." (*Id.* at p. 424.)

In civil cases, proof by a preponderance of the evidence generally suffices to satisfy due process. (See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 253.) However, when in the civil case "the government seeks to take unusual coercive action . . . against an individual," the clear and convincing evidence standard may be required. (*Ibid.*) This standard has been required when the civil proceedings involve "'a significant deprivation of liberty'" or "'stigma.'" (*Santosky v. Kramer, supra*, 455 U.S. at p. 756.) For example, the clear and convincing evidence standard may be required in cases involving termination of parental rights, involuntarily civil commitment, deportation, or denaturalization. (See *id.* at pp. 747-748, 756-757; see also *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248, 253-256 [clear and convincing evidence requirement at dispositional hearing for removal of child from parental custody (and other procedural protections) permits preponderance of evidence standard for final termination of parental rights].)

On the other hand, there are circumstances where the preponderance of the evidence standard satisfies due process even though the case involves the loss of a constitutional right. For example, in *Jones v. United States* (1983) 463 U.S. 354, the United States Supreme Court upheld a statute permitting the automatic civil commitment of a criminal defendant who had obtained a verdict of not guilty by reason of insanity by proving his mental illness in the criminal case by a preponderance of the evidence. The *Jones* court noted that the clear and convincing evidence standard was generally required

to civilly commit a person because it was "inappropriate to ask the individual 'to share equally with society the risk'" of an erroneous adjudication of mental illness. (*Id.* at p. 367.) In contrast, there was less risk of error when the individual has proven his or her mental illness in a criminal proceeding, and accordingly the preponderance of the evidence standard comported with due process for commitment of insanity acquittees. (*Id.* at pp. 367-368.)

When evaluating whether the private interest affected by the civil proceeding requires a standard of proof higher than the preponderance of the evidence standard, the courts consider "the nature of the private interest threatened and the permanency of the threatened loss." (*Santosky v. Kramer, supra*, 455 U.S. at p. 758.) Assuming *arguendo* the Second Amendment applies to the states (see fn. 3, *ante*), under *Heller* an individual's right to possess certain firearms in the home for defensive purposes is of constitutional stature. However, under section 8103, the deprivation of this interest is temporary, lasting for five years. Further, the loss concerns the loss of property, and does not involve deprivation of physical liberty or severance of familial ties. The deprivation is not akin to the types of cases—such as termination of parental rights, civil commitment, or deportation—where a clear and convincing evidence standard is typically imposed. Moreover, although the loss of the right to possess firearms can impact an individual's ability to defend him- or herself, the deprivation does not leave the individual exposed to danger without recourse to other defensive measures, such as installing home security devices and summoning the police.

Balanced against the individual's temporary loss of the right to possess firearms is the state's interest in protecting society from the potential use of firearms by a mentally unstable person. This is an exceedingly high interest which was explicitly recognized in *Heller*. (See also *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 423.) Although the preponderance of the evidence standard requires the individual to share equally in the risk of an erroneous adjudication, this is appropriate in a case involving possession of firearms by an individual who has exhibited mental instability sufficient to warrant hospitalization. If the government was required to prove the unlikelihood of safe use by clear and convincing evidence, this would increase the possibility that a person might be gravely injured or killed if the government failed in its burden of proof. Balancing the gravity of the potential consequences of a mentally unstable person's possession of firearms against the temporary deprivation of property, the balance tips in favor of permitting proof by a preponderance of the evidence.

Section 8103's use of the preponderance of the evidence standard comports with due process.

DISPOSITION

The order is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.